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No. 84-1002

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

UNITED TELECOMMUNICATIONS, INC., *et al.*,
Petitioners,
v.
DALE E. SAFFELS, United States District Judge
for the District of Kansas,
Respondent.

(Phyllis Wilson Hoffman and Equal Employment Opportunity Commission, Real Parties in Interest.)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Chamber of Commerce of the United States ("Chamber") hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessary because Ms. Hoffman, a real party in interest, has not consented to the filing of the brief. The petitioner, United Telecommunications, Inc., the respondent, Honorable Dale E. Saffels, and the Solicitor General, on behalf of the EEOC, have consented

to the filing.[1] This *amicus* brief is timely filed under Supreme Court Rule 36.1, because it is filed within the time allowed for the filing of a brief in opposition to the petition for certiorari.[2]

This case arose when the EEOC intervened in a private civil action filed by an individual, prevailed in its effort to be deemed class representative, and sought to pursue class-wide relief. The Tenth Circuit's disposition of the case raises a problematic issue that requires resolution by this Court. That issue is whether the enforcement scheme of Title VII permits the EEOC to intervene in a private action and independently pursue class claims of employment discrimination when it has not taken those claims through its administrative procedures and the named plaintiff has not obtained class certification.

The Chamber is concerned about the possible ramifications of this decision in the business community, where an employer can now be subjected to class suit without the procedural protections afforded by the requirements that the EEOC investigate, determine reasonable cause, and attempt to conciliate before litigating, and that private plaintiffs obtain class certification before proceeding with class litigation. Absent these restraints, the Commission has a built-in incentive to avoid the demanding processes of investigation and conciliation that are prerequisites to suing in its own name, since it can achieve the same result with less bother simply by intervening in a private action. And plaintiffs seeking to represent a class would be able to avoid meeting the strict requirements of Fed. R. Civ. P. 23 simply by seeking EEOC intervention.

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[1] Copies of the consent letters are being filed simultaneously with the attached brief.

[2] The Solicitor General was granted an extension of time until February 14, 1985 within which to file a response to the petition for certiorari.

As the largest federation of business organizations and individuals in the country and the principal voice of the American business community, the Chamber is well-suited to present the broad interest of business in this case. The Chamber's current membership exceeds 184,000, including over 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers. As one of its principal functions, the Chamber regularly presents its views before this Court, as well as the lower federal courts.[3]

The Chamber fears that the procedure approved in this case will establish a troubling precedent and curtail the use of informal administrative processes to resolve allegations of class discrimination prior to litigation. Congress did not intend for EEOC suits in intervention to replace private class actions and direct agency suits for class relief. Such a result would fill the courts with unsubstantiated Title VII class suits and impose a severe burden on employers, who must defend such actions. For these reasons, the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

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[3] *See, e.g., TWA* v. *Thurston*, 53 U.S.L.W. 4024 (U.S. January 8, 1985) (No. 83-997); *Bowen* v. *U.S. Postal Service*, 459 U.S. 212 (1983); *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666 (1981); *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1980).

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
ARGUMENT	2
I. THE PROCEDURE ALLOWED BY THE LOWER COURT IN THIS CASE CONTRAVENES THE ENFORCEMENT SCHEME MANDATED BY TITLE VII AND STRIPS TITLE VII DEFENDANTS OF THEIR PROCEDURAL RIGHTS	3
A. Congress Carefully Constructed an Enforcement Scheme to Preclude Improper Class Action Suits	3
B. The Process Approved in this Case Permitted a Hybrid Class Action to Proceed	8
C. Adherence to the Enforcement Scheme of Title VII Will Not Hinder the EEOC in Carrying Out its Statutory Objective	9
D. Approval of the Procedure Used In This Case Would Create a Severe Burden on Employers and other Title VII Defendants	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES: Page

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) 3
Atchison, Topeka & Santa Fe Ry. Co. v. *ICC*, 607 F.2d 1199 (7th Cir. 1979) 6
Bell v. *J. Ray McDermott & Co., Inc.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,310 (E.D. La.(1982) 4
Benson v. *Little Rock Hilton Inn*, 87 F.R.D. 447 (E.D. Ark. 1980) 4
Board of Trade v. *SEC*, 677 F.2d 1137 (7th Cir. 1982), *vacated as moot*, 459 U.S. 1026 (1982) 6
Campbell v. *Galeno Chemical Co.*, 281 U.S. 599 (1930) 6
Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984) 7
EEOC v. *Brookhaven Bank & Trust Co.*, 614 F.2d 1022 (5th Cir. 1980) 5
EEOC v. *Continental Oil Co.*, 548 F.2d 884 (10th Cir. 1977) 10
EEOC v. *Great Atlantic & Pacific Tea Co.*, 735 F.2d 69 (3d Cir. 1984), *cert. dismissed*, 53 U.S.L.W. 3326 (U.S. Oct. 19, 1984) (No. 84-275) 6
EEOC v. *Hickey-Mitchell Co.*, 507 F.2d 944 (8th Cir. 1974) 12
EEOC v. *Shell Oil Co.*, 104 S.Ct. 1621 (1984) 3
EEOC v. *Sherwood Medical Industries, Inc.*, 452 F. Supp. 678 (M.D. Fla. 1978) 11
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185 (1976) 6
FCC v. *Midwest Video Corp.*, 440 U.S. 689 (1979) 7
Federal Maritime Commission v. *Seatrain Lines*, 411 U.S. 726 (1973) 6
Ford Motor Co. v. *EEOC*, 458 U.S. 219 (1982) 3
General Telephone Co. of the Southwest v. *Falcon*, 457 U.S. 147 (1982) 8, 9, 11
Herbst v. *I.T.T. Corp.*, 495 F.2d 1308 (2d Cir. 1974) 11

TABLE OF AUTHORITIES—Continued

Page

Johnson v. *Nekoosa-Edwards Paper Co.*, 558 F.2d 841 (8th Cir. 1977), *cert. denied sub nom. Nekoosa Papers, Inc.* v. *EEOC*, 434 U.S. 920 (1977) 5

Jones v. *Holy Cross Hospital Silver Spring Inc.*, 64 F.R.D. 586 (D. Md. 1974) 4

Louisiana Chemical Association v. *Bingham*, 657 F.2d 777 (5th Cir. 1981) 6

N.O.W., Inc. v. *Minnesota Mining and Manufacturing Co.*, 73 F.R.D. 467 (D. Minn. 1977) 4

Occidental Life Insurance Co. of California v. *EEOC*, 432 U.S. 355 (1977) 3, 4, 12

Quarles v. *St. Clair*, 711 F.2d 691 (5th Cir. 1983) 6

Schmidt v. *Fuller Brush Co.*, 527 F.2d 532 (8th Cir. 1975) 11

Southern Motor Carriers Rate Conference v. *United States*, 676 F.2d 1374 (11th Cir. 1982) .. 6

Sperry Rand v. *Larson*, 554 F.2d 868 (8th Cir. 1977) 11

Talley v. *Mathews*, 550 F.2d 911 (4th Cir. 1977) .. 6

Truvillion v. *King's Daughters Hospital*, 614 F.2d 520 (5th Cir. 1980) 11

Weeks v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969) 5

Willis v. *Allied Maintenance Corp.*, 75 F.R.D. 622 (S.D.N.Y. 1976) 4

W.R. Grace & Co. v. *Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 103 S.Ct. 2177 (1983) 3, 5

STATUTES:

Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e, *et seq.*) ..... *passim*

Section 705, 42 U.S.C. § 2000e-4 2

Section 706, 42 U.S.C. § 2000e-5 ..... 2, 4, 6, 8

Section 707, 42 U.S.C. § 2000e-6 4

TABLE OF AUTHORITIES—Continued

Page

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 23 ..... *passim*

LEGISLATIVE MATERIALS:

118 Cong. Rec. 7563 (1972) 5

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief *Amicus Curiae* for a statement of the Chamber's interest in this proceeding.

ARGUMENT

This action came to the Tenth Circuit on the petition of United Telecommunications, Inc. ("UTI") for a writ of mandamus.[1] UTI asserted that the district court exceeded its jurisdiction in allowing the Equal Employment Opportunity Commission ("EEOC") to independently pursue class claims of discrimination after it entered a private suit as an intervenor.[2] The Tenth Circuit dismissed the petition, holding that the EEOC was neither required to comply with the class action requirements of Fed. R. Civ. P. 23 nor with administrative prerequisites before intervening and independently seeking class-wide relief. The Tenth Circuit focused on the straw man of whether the EEOC must complete administrative processes or comply with Rule 23 before intervening in a private action.[3] Petitioner does not challenge the EEOC's intervention in this action,[4] but rather its subsequent attempt to independently litigate uncertified, unprocessed class claims it could not otherwise bring to court.

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[1] The Chamber respectfully refers the Court to Petitioner's Statement of the Case, where the relevant facts and proceedings below are set forth, and incorporates the same herein by reference.

[2] EEOC intervention in a suit brought by an aggrieved individual is authorized by §§ 705(g)(6) and 706(f)(1) of the Civil Rights Act of 1964 as amended, Title VII, 42 U.S.C. §§ 2000e-4(g)(6), 2000e-5(f)(1).

[3] *See* Order and Opinion of the Tenth Circuit dated August 15, 1984, Pet. App. 4a ("That Congress required the Commission to satisfy certain administrative procedures before initiating a law suit on its own does not require us to find an ambiguity in the plain language of Section 706(f)(1), which permits intervention without requiring the satisfaction of those administrative procedures. It would be a tortured construction to conclude that when intervening, the Commission somehow becomes subject to Rule 23 when in fact the Supreme Court has made clear that the Commission is not subject to Rule 23 when bringing a direct action in the first instance."). ("Pet. App." refers to the appendix filed with this Court by the petitioner UTI.)

[4] *See* Petition for Certiorari (hereafter "Pet.") at p. 11 n.3.

By its decision in this case, the Tenth Circuit has approved a process whereby the EEOC can act upon an individual plaintiff's untested allegations of class harm, intervene and independently litigate a class action involving a company's entire personnel system. Because this contradicts the enforcement scheme of Title VII and potentially subjects businesses to frivolous and premature employment practice class suits, the Chamber supports the certiorari petition and urges this Court to grant review.

I. THE PROCEDURE ALLOWED BY THE LOWER COURT IN THIS CASE CONTRAVENES THE ENFORCEMENT SCHEME MANDATED BY TITLE VII AND STRIPS TITLE VII DEFENDANTS OF THEIR PROCEDURAL RIGHTS.

A. Congress Carefully Constructed An Enforcement Scheme to Preclude Improper Class Action Suits.

As enacted in 1964, Title VII did not empower the EEOC to sue employers to enforce the Act.[5] Rather, "[c]ooperation and voluntary compliance were selected as the preferred means" for achieving equality of employment opportunities.[6]

The 1972 amendments to Title VII[7] provided the EEOC with enforcement authority. Under these amendments, the Commission is empowered to initiate litiga-

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[5] Civil Rights Act of 1964, Pub. L. 88-352, Title VII, 78 Stat. 253 (codified at 42 U.S.C. § 2000e).

[6] *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). These means are still preferred. *See, EEOC* v. *Shell Oil Co.*, 104 S.Ct. 1621, 1635 (1984); *W.R. Grace & Co.* v. *Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 103 S.Ct. 2177, 2186 (1983); *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 228 (1982); *Occidental Life Insurance Co. of California* v. *EEOC*, 432 U.S. 355, 368 (1977).

[7] Equal Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e).

tion to vindicate individual instances of employment discrimination, and to investigate and act on a charge of a pattern or practice of discrimination.[8] The prerequisites to EEOC litigation under either of these sections are investigation, determination of reasonable cause, and attempted conciliation.[9] The EEOC is also authorized to intervene in actions brought by individuals under § 706.[10] But the scope of the Commission's intervention is limited to those claims which the private plaintiff properly brings before the court or the EEOC uncovers in the course of investigation. *Bell* v. *J. Ray McDermott & Co., Inc.*, 30 Empl. Prac. Dec. (CCH) ¶ 33,310 (E.D. La. 1982); *Benson* v. *Little Rock Hilton Inn*, 87 F.R.D. 447, 449 (E.D. Ark. 1980); *N.O.W., Inc.* v. *Minnesota Mining and Manufacturing Co.*, 73 F.R.D. 467, 471 (D. Minn. 1977); *Willis* v. *Allied Maintenance Corp.*, 75 F.R.D. 622 (S.D.N.Y. 1976); *Jones* v. *Holy Cross Hospital Silver Spring Inc.*, 64 F.R.D. 586, 591 (D. Md. 1974).

As this Court stated in *Occidental Life Insurance Co. of California* v. *EEOC*, *supra*, 432 U.S. at 368:

> [U]nder the procedural structure created by the 1972 amendments, the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion.

By contrast, in this action, the EEOC was allowed to proceed as class representative and the named plaintiff was precluded from proceeding in that capacity.[11]

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[8] Title VII, §§ 706, 707, 42 U.S.C. §§ 2000e-5, 2000e-6(a).

[9] These requirements are contained in sections 706(b), 706(f)(1), and 707(e), 42 U.S.C. §§ 2000e-5(b), 2000e-5(f)(1), 2000e-6(e).

[10] *See* n.2, *supra*.

[11] *See* Memorandum and Order of District Court dated October 3, 1984, Pet. App. 16a ("[t]he purposes of the court's ruling

It was Congress' intent that the EEOC would not litigate claims unless conciliation was attempted and the efforts failed. As stated by Congressman Perkins, the House sponsor of the 1972 amendments to Title VII:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as is required by existing law. Only if conciliation proves to be impossible do we expect the Commission to bring action in Federal district court to seek enforcement.

118 Cong. Rec. 7563 (1972). And as this Court stated in *W.R. Grace*, *supra*, 103 S.Ct. at 2186, "[c]ritical to the compliance scheme is the Commission's role in settling Title VII disputes through conference, conciliation, and persuasion before a Title VII plaintiff or the Commission may bring suit." The EEOC should not be allowed to circumvent the Congressional scheme by intervening and independently litigating a class action without investigating or attempting to conciliate the matter.[12]

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allowing the EEOC to proceed as class representative would not be advanced by allowing plaintiff to retain the option to proceed as class representative").

[12] *See EEOC* v. *Brookhaven Bank & Trust Co.*, 614 F.2d 1022, 1026 (5th Cir. 1980) (Reavley, J., dissenting) ("Conscientious adherence to the statutory prerequisites is more than an exaltation of form over substance. The language of the statute insures that trifles do not become subjects of EEOC suits and that employers are not harassed by an overzealous EEOC staff."); *Johnson* v. *Nekoosa-Edwards Paper Co.*, 558 F.2d 841, 847-48 (8th Cir. 1977), *cert. denied sub nom. Nekoosa Papers, Inc.* v. *EEOC*, 434 U.S. 920 (1977) ("[c]onciliation is . . . an integral part of Title VII, . . . and is desirable for a variety of policy reasons including giving the defendant notice and an opportunity to respond to any additional claims revealed by the EEOC investigation and in order to avoid expensive and time-consuming court actions"); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 231 (5th Cir. 1969) ("we think it is clear that the purpose of certain of the procedural requirements of Section 2000e-5 is to protect employers from unfounded charges and harassment").

In the instant action, the EEOC seeks to litigate the claims of as many as 40,000 individuals in as many as 35 states and 100 separate facilities (Pet. at pp. 3-4). The congressional objective of achieving voluntary compliance with EEO laws and affording employers an opportunity to conciliate before litigating plainly survives with respect to class claims even after a plaintiff has brought suit on her own behalf. Indeed, the statute provides that the court may stay further proceedings for 60 days pending "further efforts of the Commission to obtain voluntary compliance." 42 U.S.C. § 2000e-5(f)(1).[13]

It is well recognized that an administrative agency cannot exceed the specific statutory authority granted it by Congress.[14] The role of agencies remains basically to execute legislative policy; they are no more authorized than are the courts to rewrite acts of Congress.[15] They may not bootstrap themselves into areas in which they have no jurisdiction by violating their statutory mandates. *Federal Maritime Commission* v. *Seatrain Lines*, 411 U.S. 726, 745 (1973). The EEOC must conduct its enforcement activities within the enforcement scheme constructed by Congress.

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[13] *See also, EEOC* v. *Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 84 (3d Cir. 1984), *cert. dismissed*, 53 U.S.L.W. 3326 (U.S. Oct. 19, 1984) (No. 84-275) ("[t]he express policy of Title VII favors voluntary compliance not only before, but even after an EEOC suit is filed").

[14] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14 (1976); *Campbell* v. *Galeno Chemical Co.*, 281 U.S. 599, 610 (1930). *Accord, Atchison, Topeka & Santa Fe Ry. Co.* v. *ICC*, 607 F.2d 1199, 1203 (7th Cir. 1979).

[15] *Talley* v. *Mathews*, 550 F.2d 911, 919 (4th Cir. 1977). *Accord, Quarles* v. *St. Clair*, 711 F.2d 691, 708 n.60 (5th Cir. 1983); *Board of Trade* v. *SEC*, 677 F.2d 1137, 1142 n.8 (7th Cir. 1982), *vacated as moot*, 459 U.S. 1026 (1982); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 676 F.2d 1374, 1380 (11th Cir. 1982); *Louisiana Chemical Association v. Bingham*, 657 F.2d 777, 779 (5th Cir. 1981).

The EEOC procedures of investigation and determination of whether there is reasonable cause to believe that class allegations are true provide employers with the same kinds of protections against improper class actions as those of Rule 23.[16] The EEOC's investigation and determination reveal whether the elements of a *bona fide* class action exist. Moreover, the conciliation requirement provides the employer with an opportunity to resolve the dispute without litigation. Compliance with the prerequisites of Title VII and Rule 23 will preclude unnecessary expenditures to defend lawsuits that Congress never intended be brought as class actions.

When there is a lack of Congressional guidance, this Court may defer to an agency's judgment regarding the scope of its authority. However, where there are "strong indications that agency flexibility [is] to be sharply delimited," the Court has declined to do so. *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 708 (1979).[17] This is just such a case. Congress has carefully restricted the EEOC's powers of suit to require that it first attempt informal methods of conciliation and persuasion. Accordingly, the Commission should not be allowed to exceed its delegated powers and circumvent the statutory scheme in this manner.

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[16] Rule 23 requires that the named plaintiff demonstrate, *inter alia*, numerosity, common questions of law or fact, typicality of the claims or defenses of the representative, and adequacy of the representative to protect the interests of the class. (The relevant provisions of Rule 23 are set forth at Pet. App. 23a-24a.) The defendant has the opportunity to challenge the existence of each of these factors.

[17] *See also, Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778, 2781-82 (1984) ("[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress").

B. The Process Approved in This Case Permitted A Hybrid Class Action Suit to Proceed.

The EEOC moved to intervene permissively in this case more than two years after Ms. Hoffman filed an EEOC charge and 10½ months after the EEOC issued a notice of right to sue.[18] The district court allowed the EEOC to proceed as the class representative, even though the asserted purpose of this exercise was to "avoid[] the discovery and hearings necessary to obtain a determination pursuant to Rule 23 of the Federal Rules of Civil Procedure in regard to certification of [Hoffman] as a class representative and certification of this action as a class action." Memorandum in Support of Plaintiff and Plaintiff-Intervenor's Motion to deem EEOC as Representative of the Class at pp. 4-5. These are precisely the procedures that prevent improper class suits.

Had the EEOC sought to bring direct suit on the class claims, the action would have been dismissed due to the EEOC's failure to process the claims it sought to litigate. Had the named plaintiff sought to bring a class action, her allegations would have been held up to the standards of Rule 23. But the result of the lower court's decision was to allow the EEOC to accomplish by intervention what could not have been achieved otherwise; a class action suit based on bare, untested allegations of class harm. As this Court noted in *General Telephone Co. of the Southwest* v. *Falcon*, 457 U.S. 147, 159 (1982), "[i]f one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential companywide class action." Such contradiction of the carefully constructed statutory enforcement scheme of Title VII must not be permitted.

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[18] A right to sue letter is issued by the EEOC following the completion of its administrative processes, or upon request of the complainant after the EEOC has had jurisdiction for 180 days. 42 U.S.C. § 2000e-5(f)(1). Plaintiff in this case requested a right to sue letter after 180 days.

Moreover, such a procedure would allow and even encourage named plaintiffs seeking to represent a class to avoid the strict prerequisites of Rule 23 by the simple device of seeking intervention by the EEOC. In this way, what is really a private action brought by a single plaintiff is converted into a far-reaching class action, without any showing by the named plaintiff that his claim is typical, or common, or that he shares any community of interest with other class members. This is exactly the type of "wholesale expansion" of class actions the Court in *General Telephone Co. of the Southwest* v. *Falcon* sought to prevent. 457 U.S. at 159.

C. Adherence to the Enforcement Scheme of Title VII Will Not Hinder the EEOC in Carrying Out Its Statutory Objective.

The EEOC has many opportunities under Title VII to ensure that a case is litigated as broadly or narrowly as it desires. In addition to its exclusive authority to bring suit for the first 180 days after a charge is filed (unless it dismisses the charge), and its authority to intervene and litigate any claims a private litigant properly places before the court, the Commission can also expand a private suit to include any claim it uncovers in the course of its investigation, so long as a reasonable cause finding is entered and conciliation is attempted. In sum, it is not the case that the Commission will be unable to vindicate the public interest in nondiscriminatory employment policies unless it is allowed to pursue, as an intervenor, class claims that it has not administratively processed. It need only await the outcome of the Rule 23 certification process initiated by a private plaintiff and participate as an intervenor, or comply with administrative prerequisites before bringing suit in its own name.

The district court below attached great importance to the fact that in the Tenth Circuit, the filing of a private Title VII action cuts off the EEOC's ability to bring a

direct suit based on the private plaintiff's charge, and relegates the Commission to intervention in the private suit.[19] This argument misses the mark. The EEOC's ability to enforce the statute is not subject to the actions of charging parties. As clarified by the Tenth Circuit in *EEOC* v. *Continental Oil Co.*, 548 F.2d 884 (10th Cir. 1977), when an individual brings suit on a charge of discrimination, the EEOC is thereafter precluded by Tenth Circuit law only from bringing a separate suit on that charge. As the *Continental Oil* court noted:

> If there are additional incidents of discrimination and the EEOC has foregone its opportunities to address them in a suit filed on a particular charge, additional charges may be obtained upon which to proceed. Further, if the additional incidents sought to be addressed are pervasive, the matter could be certified for § 707 processing, which section affords a broad based remedy without regard to individual charges or complaints.

Id., 548 F.2d at 890.

In the instant case, Ms. Hoffman's suit was never certified as a class action. Had it proceeded as an individual action, the EEOC would have been precluded only from filing a separate suit on Ms. Hoffman's charge. Had the action been certified as a class action, the EEOC's attempt to gain class-wide relief after intervening would have been appropriate. Thus, the Commission is not hindered by the actions of charging parties, but rather is subject only to the requirements of the statute.

D. Approval of the Procedure Used in This Case Would Create a Severe Burden on Employers and Other Title VII Defendants.

Defending class actions can place an extreme burden on employers and other Title VII defendants. The cost of

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[19] Memorandum and Order of District Court dated April 11, 1984, Pet. App. 10a.

defending a large class action discrimination suit can be devastating to a business, both in terms of lost working hours and counsel fees.[20] The requirements of Title VII that the EEOC investigate and attempt to conciliate any claim before litigating as well as the class action prerequisites of Fed. R. Civ. P. 23 provide protections against improper class action suits. *See generally, General Telephone Co. of the Southwest* v. *Falcon, supra,* 457 U.S. at 160-61.

One of the purposes of the requirement of administrative processing of claims by the EEOC before litigation is to allow input by the employer before suit is instituted.[21] Under the procedure used in this case, every business would be fair game for EEOC class suit, without opportunity to question, challenge or conciliate. This is not what Congress intended in enacting Title VII's "integrated multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in federal

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[20] *See Sperry Rand* v. *Larson,* 554 F.2d 868, 871 n.3 (8th Cir. 1977); *Schmidt* v. *Fuller Brush Co.,* 527 F.2d 532, 535 (8th Cir. 1975); *Herbst* v. *I.T.T. Corp.,* 495 F.2d 1308, 1312 (2d Cir. 1974).

[21] *See EEOC* v. *Sherwood Medical Industries, Inc.,* 452 F. Supp. 678, 683-84 (M.D. Fla. 1978) ("Once having determined that a respondent has violated Title VII, the Commission must make a genuine effort to conciliate with respect to each and every employment practice complained of. In this way, the respondent is afforded a fair opportunity to weigh all the factors which must be taken into account in deciding whether to settle a dispute out of court, even if the charge of discrimination in dispute arose from the Commission's own investigation rather than the charging party's charge. And if litigation then results, all parties are assured that they have had a fair opportunity to settle every matter in dispute. The Congressional mandate that litigation be a matter of last resort will have been observed."). *See also, Truvillion* v. *King's Daughters Hospital,* 614 F.2d 520, 524 (5th Cir. 1980) (the required EEOC notice of failure of conciliation protects the employer by warning him of his last chance to obtain an amicable resolution of the EEOC's complaint).

court." *Occidental Life Insurance Co. of California* v. *EEOC*, *supra*, 432 U.S. at 359.[22]

CONCLUSION

The Chamber believes that the holding of the Tenth Circuit could have wide-ranging ramifications in the business community, eroding the protections against improper class action suits contained in Title VII and Rule 23. Accordingly, the Chamber respectfully urges this Court to grant the petition for certiorari filed by UTI.

Respectfully submitted,

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February 14, 1985

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[22] *See also*, *EEOC* v. *Hickey-Mitchell Co.*, 507 F.2d 944, 948 (8th Cir. 1974) ("[t]he Commission's power of suit and administrative process [are not] unrelated activities, [but] sequential steps in a unified scheme for securing compliance with Title VII") (citation omitted).